Supreme Court, U.S.
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No. 01-949

In The

Supreme Court of the United States

FRIENDS OF RICHARDS-GEBAUR AIRPORT,

Petitioner,

vs.

FEDERAL AVIATION ADMINISTRATION,
JANE GARVEY, ADMINISTRATOR;
CITY OF KANSAS CITY, MISSOURI;
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF OF FRIENDS OF RICHARDS-GEBAUR AIRPORT

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REPLY BRIEF

Respondent, City of Kansas City, Missouri (the "City") has filed a Brief in Opposition ("Opposition") to Petitioner's Petition for Writ of Certiorari, and has raised new points which are addressed herein.

Friends and AOPA Are Not Inconsistent

The City has mistakenly stated that the Aircraft Owners and Pilots Association's ("AOPA") position directly contravenes that of Petitioner with respect to the deference to be given to the Federal Aviation Administration's ("FAA") Orders. It is important to note that the Petitioner, Friends of Richard addressed different orders, different regulations and different statutes than did the AOPA.

The Orders which are the subject of Friends's Petition are FAA Order 1050.1D and FAA Order 5050.4A. FAA Order 1050.1D was published in response to Council on Environmental Quality ("CEQ") regulation 40 C.F.R. § 1507.3(a), which required each agency to develop procedures to be published in the *Federal Register* for comment. FAA Order 5050.4 is the Environmental Handbook of the Federal Aviation Office of Airport Planning and Programming and it is consistent with the Federal Environmental procedures contained in Order 1050.1D. See 1050.D at ¶ 4f. Both FAA Order 1050.1D and Order 5050.4A contain the same categorical exclusions and extraordinary circumstances which were published pursuant to CEQ regulations and are published in the *Federal Register* for public comment and review. The FAA Orders and CEQ regulations are promulgated pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331, et seq. The Order at issue in the AOPA brief is FAA Order 5190.6A, which addressed 49 U.S.C. § 47153 relating to the transfer of surplus property for public airports. That is a totally separate statute and subject matter than NEPA. Thus, the position of the Friends and

AOPA are not in conflict and they do not contravene each other.

Grandview's Failure to Join in Petition Is Not Relevant

The City has commented that the City of Grandview did not join Friends in the Petition. Opposition at 4. The City noted that, "It is highly significant that Grandview itself has not sought review in this Court." Opposition at 10. Grandview's decision not to join in the Petition is no more relevant than the Federal Aviation Administration and Kansas City Southern Railway Company's decisions not to join the City in opposing the Petition.

Friends' Petition Presents Matters Warranting Supreme Court Review

The City contends that the issues in this case relate only to factual issues and the inferences to be drawn from those facts. That is not the situation. Friends has set forth the facts in the case that are material to consideration of the questions presented, which include issues relating to the deference that the courts are to give to the FAA Orders promulgated pursuant to CEQ regulations and published in the *Federal Register* for review and comment, and issues relating to the ability of agencies to disregard NEPA requirements to utilize interdisciplinary approaches and to consider the cumulative environmental impacts of a project when granting a categorical exclusion. All of these are proper issues for this Court. The facts were presented because they are necessary for the court's proper consideration of the questions presented. See Supreme Court Rule 14.1(g).

There is a Conflict Between Circuits

City contends there is no conflict between the circuits because in *Rhodes v. Johnson*, 153 F.3d 785 (7th Cir. 1998), the U.S. Forest Service acknowledged extraordinary circumstances but then determined that those circumstances

would not have a significant impact on the environment and elected not to perform an environmental assessment, whereas in this instance the FAA and the Eighth Circuit did not find that there were any extraordinary circumstances. This is an oversimplification. In order for the FAA and the Eighth Circuit to find that there were no extraordinary circumstances, they had to disregard and violate provisions of FAA Order 1050.1D and Order 5050.4A. Both the FAA and the Eighth Circuit found facts constituting extraordinary circumstances, as defined in Order 1050.1D and 5050.4A, but dismissed them out of hand saying they were not significant. A prime example is the issue of air quality. According to the FAA Orders, it is an extraordinary circumstance if an action is likely to have a significant impact on air quality or violates a local, *state*, or federal standard for air quality, or is inconsistent with any federal, *state*, or local law or *administrative determination* relating to the environment. See FAA Order 1050.1D ¶ 32, and FAA Order 5050.4A ¶ 24. Even after correcting their initial mistakes in their Order granting a categorical exclusion, Petition App. 36, the FAA still acknowledged that carbon monoxide (CO) emissions resulting from the proposed intermodal facility in the year 2018 would be 129 tons per year. Petition App. at 52. Missouri Regulation 10 C.S.R. 10.6.020(2) provides that an emission equal to or exceeding the de minimis level of 100 tons per year of carbon monoxide is significant. This Missouri Regulation is undeniably a *state standard* for air quality and a state administrative determination related to the environment. FAA Order 1050.1D at ¶ 32f(2) and (4). See FAA Order 5050.4A ¶ 24f(2)(4). The FAA acknowledged that the carbon monoxide emissions for the year of 2018 is 29% over the de minimis level set by the state. See Petition App. 55. The City contends that the 100 ton per year threshold of carbon monoxide emissions does not apply to the intermodal facility based upon Federal law. That is not the issue. The issue is that the air quality violated state standards. The City also alleges that "emissions slightly exceeding 100 tons of CO emissions in

the eighteenth year [are], far too low and remote in time to trigger any concern." Opposition at 9. It is the FAA that initially set the term of eighteen years to evaluate the effects of this project. Further, a quantity of carbon monoxide exceeding the standard by 29% can hardly be considered only "slightly exceeding 100 tons."

Respondent Kansas City further discounts the conflict between the Seventh and Eighth Circuits on the basis that the U.S. Forest handbook was promulgated by notice and comment and was thus treated by the Seventh Circuit as a regulation entitled to full *Chevron* deference. Opposition at 7. That is the heart of an issue herein. The Eighth Circuit did not consider the categorical exclusion and extraordinary circumstances promulgated in FAA Orders 1050.1D and 5050.4A worthy of *Chevron* deference. However, the categorical exclusions and extraordinary circumstances of both the U.S. Forest Service and the FAA which were promulgated in response to 40 C.F.R. 1507.3, were published in the *Federal Register* and were subject to notice and comments. The City continues to overlook or disregard the fact that the FAA's categorical exclusions and extraordinary circumstances were developed pursuant to requirements of 14 C.F.R. 1507.3 and were, as is required by § 1507.3, adopted only after they were promulgated for notice and comment. FAA Order 5050.4A contains the same categorical exclusion and extraordinary circumstances as does FAA Order 1050.1D. See FAA Order 1050.D at ¶ 4f ("Order 5050.A . . . is consistent with federal environmental procedures contained in this order. . . . "). Thus, since as admitted by the City, the U.S. Forest Service handbook was properly given full *Chevron* deference by the Seventh Circuit and the FAA Orders herein were not given such deference, clearly there is a conflict between the United States Court of Appeals for the Eighth Circuit and the United States Court of Appeals for the Seventh Circuit, which needs resolution by this Court.

The Eight Circuit Has Decided an Important Question of Federal Law That Should Be Settled by the Supreme Court

The City argues that the FAA had neither the jurisdiction nor requirement to consider the effects of the future track construction. Opposition at 11. The future track construction is not only a possibility, it is a foregone conclusion for this major truck-rail intermodal facility. The City's and the Eighth Circuit's contention that the FAA does not have the jurisdiction or requirement to consider the cumulative effects of the track vividly demonstrates that there is a major question of national interest. The analysis of the laws and regulations by the City and the Eighth Circuit is directly contrary to the dictates of 42 U.S.C. § 4332(2)(a), which requires all agencies to "utilize a systematic, interdisciplinary approach, which will ensure the integrated use of the natural and social sciences and the environmental design art in planning and decision making which may have an impact on managing environment." Further, the process used by the FAA and accepted by the Eighth Circuit Court of Appeals violates the CEQ regulations relating to cumulative effects and use of interdisciplinary approaches. See 40 C.F.R. § 1507.2, 1508.4, 1508.7, and 49 C.F.R. 1105.6. Contrary to the assertion of the City and the FAA, there is no statutory or regulatory impediment to the FAA considering the future railroad track construction which will be built in the intermodal facility when considering their decision whether or not to grant a categorical exclusion. Whether the interdisciplinary approach and cumulative impact are to be considered in evaluating environmental impacts is an important question of federal law which must be settled by the U.S. Supreme Court because it will have a major impact for years to come on the environment and the citizens of the United States.

Respectfully submitted,

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